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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - -X
UNITED STATES OF AMERICA 15-CR-157(A)
vs.
COREY KRUG, Buffalo, New York
Defendant. January 21, 2016
10:59 a.m.
- - - - -X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE H. KENNETH SCHROEDER, JR.
UNITED STATES MAGISTRATE JUDGE

WILLIAM J. HOCHUL, ESQ.
United States Attorney
BY: JOHN E. ROGOWSKI, ESQ.
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202

CONNORS, LLP
BY: TERRENCE M. CONNORS, ESQ.
1000 Liberty Building
424 Main Street
Buffalo, New York 14202
Appearing on behalf of the Defendant

AUDIO RECORDER: Llane M. Guidotti

TRANSCRIBER: Christi A. Macri, FAPR-CRR
Kenneth B. Keating Federal Building
100 State Street, Room 2120
Rochester, New York 14614

(Proceedings recorded by electronic sound recording,
transcript produced by computer).

P R O C E E D I N G S

* * *

(WHEREUPON, the defendant is present).

THE CLERK: United States versus Corey Krug,
Docket No. 15-CR-157(A). This is argument on pretrial
motions.

Assistant United States Attorney John Rogowski
appearing on behalf of the Government.

And Terrence Connors appearing with defendant.

MAGISTRATE JUDGE SCHROEDER: Good morning.

MR. CONNORS: Good morning, Your Honor.

MR. ROGOWSKI: Good morning, Your Honor.

MAGISTRATE JUDGE SCHROEDER: We're here for
argument of defendant's pretrial motions. Are we ready to
proceed?

MR. CONNORS: We are.

MAGISTRATE JUDGE SCHROEDER: All right.
Mr. Connors.

MR. CONNORS: May it please the Court, Your Honor,
on May 8th, 2015, a federal grand jury was empaneled to hear
allegations against police officer Corey Krug.

That day was the commencement of the grand jury
presentation with respect to three series of allegations. No.
1 was an allegation that allegedly occurred on November 27th,
2014, the Devin Ford incident. You may remember it was on

1 Thanksgiving eve, about six months prior to the time that the
2 grand jury was empaneled.

3 The other item for consideration by the grand
4 jurors was a February 4th, 2011 incident, the arrest of Daniel
5 Rashada, something that occurred four years and seven months
6 prior to the impaneling of the grand jury.

7 The last incident for consideration was an incident
8 involving Marcus Worthy. That allegedly occurred on
9 August 29th, 2010, almost five years to the day when the
10 indictment eventually gets returned.

11 **MAGISTRATE JUDGE SCHROEDER:** Would you not agree
12 the statute of limitations had not run on any of those events?

13 **MR. CONNORS:** I do agree. There was two days left
14 on the statute of limitations for Marcus Worthy.

15 And you may note in some of the documents that both
16 Jack and I have submitted, sometimes it's referred to as the
17 August 27th date, sometimes August 28th. We now believe, for
18 the benefit of the Court, it was -- August 27th was the return
19 of the Worthy indictment, two days before the statute of
20 limitations expired.

21 But what I'd like to bring to your attention is a
22 matter that's I think unusual, but the subject of some review
23 by us in our motions because while that grand jury was
24 considering the evidence, while they were deliberating in an
25 impartial and unbiased fashion as they are required to by

1 statute, a criminal complaint was filed against Corey.

2 **MAGISTRATE JUDGE SCHROEDER:** On two of the events.

3 **MR. CONNORS:** On August 12th, 2015, on one of the
4 events.

5 **MAGISTRATE JUDGE SCHROEDER:** One of the events.

6 **MR. CONNORS:** Interestingly, Your Honor, the event
7 that was not stale, not timely, the Thanksgiving eve event.
8 Why that criminal complaint in all its detail had to be filed
9 is something that escapes me, but we do think it's something
10 that you should consider because you have the grand jury
11 considering evidence involving three incidents.

12 Then all of a sudden there's a criminal complaint
13 filed in which the Government says we believe there's probable
14 cause to arrest and charge Officer Krug, and then a swarm of
15 media attaches; the video gets played again from Thanksgiving
16 eve, there's coverage on all the outlets, all the stations.
17 Frankly, I think even this one there was an AP outlet as well
18 that was covered.

19 So you have a situation where grand jurors are
20 supposedly deliberating and considering and they have
21 essentially been told publicly that we believe that there is
22 probable cause and here it is laid out in a sworn affidavit.

23 So that -- that particular event precedes the
24 return of the first indictment because it was roughly 16 days
25 later that the indictment of Corey Krug for the Marcus Worthy

1 incident occurs.

2 That's the one that has the statute of limitations
3 just about to expire. And then a week later the superseding
4 indictment is returned naming all three of the incidents in a
5 superseding indictment. Years apart, but, nevertheless,
6 joined for trial, which would be the subject of one of our
7 arguments today.

8 **MAGISTRATE JUDGE SCHROEDER:** On that, so you don't
9 take up time needlessly, the severance motion has got to be
10 considered by the trial judge.

11 **MR. CONNORS:** I did know in my research that some of
12 the severance motions were considered by some of the other
13 magistrates before and with a recommendation to the presiding
14 Article III judge.

15 **MAGISTRATE JUDGE SCHROEDER:** Right. But that's
16 been changed and, in fact, it expressly states in the
17 scheduling order all motions for severance are to be made to
18 the trial judge because there was an area of doubt for some
19 period of time until finally the Second Circuit Court of
20 Appeals said that severance motions are for the Article III
21 judge.

22 **MR. CONNORS:** Yes, thank you. That will cut us a
23 little bit short, but it does -- I did think perhaps a
24 recommendation would still be in order.

25 But, nevertheless --

1 **MAGISTRATE JUDGE SCHROEDER:** But I haven't had that
2 referred to me, so I wouldn't have jurisdiction. If the
3 Article III judge doesn't refer the issue, we don't have it
4 under the statute.

5 **MR. CONNORS:** So on the referral order it has to
6 specifically say consider Rule 8(a) or 14(a) severance motions
7 as well?

8 **MAGISTRATE JUDGE SCHROEDER:** Right.

9 **MR. CONNORS:** Okay, thank you for telling me that.
10 Well, I've got a fair amount to talk about on the
11 pre-indictment delay. And we've been here before, we visited
12 this issue once before, Your Honor. This one is a little
13 different and I think in some respects far more interesting
14 and a much better argument than the last time we appeared
15 before you to make this on another indictment.

16 I understand full well, and I've been told in every
17 presentation by the Government that the statute of limitations
18 is the primary guarantee against stale and untimely charges.
19 I get that, I understand that.

20 I go into this argument with that as a given, but
21 it's not the only protection for the public against stale and
22 untimely charges. Without question, the due process clause
23 allows you to challenge an indictment that's old, untimely,
24 maybe within the statute of limitations if you can demonstrate
25 a violation of due process of law, and we believe we can in

1 this particular case.

2 **MAGISTRATE JUDGE SCHROEDER:** But the case law would
3 say the violation of due process is one in which the delay was
4 done for the benefit of the prosecution to obtain an
5 advantage.

6 **MR. CONNORS:** A tactical advantage. I think I can
7 establish that here. You know, it's interesting, I was
8 telling Jack earlier I must have read every speedy trial case
9 in the last two days preparing for this, and even within our
10 circuit there's a split on the quality of analysis that has to
11 be done in determining what you must show under due process
12 claim.

13 But before I get to that, in my preparation for
14 this I came across an issue that I'd like to preserve, if
15 possible. I recognize that it wasn't specifically identified
16 in our brief, but it's simply another ground for the
17 pre-indictment delay.

18 I believe that you can effectively argue in this
19 particular situation that the Sixth Amendment right to a
20 speedy trial applies as well, not just the Fifth Amendment
21 right to due process, and this is why:

22 In the seminal case on this, *U.S. vs. Marion*, in
23 1971, which I think is the last time the Supreme Court has
24 visited the issue of Sixth Amendment applicable in a
25 pre-indictment posture. There's been a lot of case law in the

1 circuit since then, and it's not -- clearly not all in my
2 favor.

3 But essentially what *Marion* said was that an
4 accused shall enjoy the right to a speedy trial, but the
5 definition of accused was specified with respect to arrest of
6 some kind. And, of course, Corey wasn't arrested while this
7 matter was pending.

8 But I read through the entire case and I saw that
9 there was a substantial dissent, admittedly a dissent by some
10 distinguished judges, and I recognized from the other research
11 that I've done in other cases that there are constitutional
12 rights that attach to individuals prior to the time that
13 they're arrested: Right to counsel classic example.

14 I do believe that in this particular situation we
15 can distinguish this because an accused is not just someone
16 who has been arrested. And I think that that issue is ripe
17 for a decision by the Supreme Court again.

18 Let me tell you why Corey fits.

19 **MAGISTRATE JUDGE SCHROEDER:** But even if that
20 premise were sound, the case law does also say, does it not,
21 that the due process violation has to be one resulting in
22 prejudice to the defendant or harm?

23 **MR. CONNORS:** It does, and I'm going to talk about
24 that as well because I think we can establish that in this
25 particular case.

1 So for purposes of the Sixth Amendment, it occurred
2 to me that some of the criteria applies to Officer Krug. He's
3 a member of the police force that's clearly been accused by
4 virtue of a complaint that's made to Internal Affairs at the
5 time, Professional Standards Division now.

6 That's something that we know went in at least with
7 respect -- with respect to all three, but certainly with
8 respect to the old charges.

9 That implicates a number of things that make him an
10 accused. That implicates his right to maintain his position
11 as an officer; his job itself, that's an important matter; it
12 puts him under the scrutiny of the Internal Affairs, which is
13 sort of a quasi investigative power; it effects civil
14 litigation as well, which clearly is an accusation, not a
15 criminal accusation, but the Sixth Amendment says an accused,
16 not a criminal accused; and, finally, it subjects him to a
17 federal referral.

18 In other words, most of these cases when they are
19 prosecuted they certainly could get prosecuted by the local
20 district attorney under not constitutional law violations, but
21 under simple assaults, a number of other Penal Law violations,
22 but most of them end up getting a referral, which puts him in
23 a category, if there's a referral made, of an accused.

24 No referral was apparently made, at least not that
25 we can detect during this time period, but we do know that

1 during this time period there was a close relationship between
2 the Department of Justice and the City of Buffalo Police
3 Department. We've documented that through two agreements, the
4 original one and the amended agreement, and some other
5 correspondence that talks about requesting authority of DOJ
6 for extensions of investigations.

7 But I read through that very carefully that
8 agreement, and it talks about a number of things, but I was
9 struck by the fact that it talked about a requirement of
10 interaction on a monthly -- or maybe it was quarterly basis --

11 **MAGISTRATE JUDGE SCHROEDER:** Reporting system?

12 **MR. CONNORS:** Yes, the reporting system and the
13 tracking system as well. And under those circumstances, there
14 you have a situation, okay, it may be that the federal law
15 enforcement officers declined to prosecute during that time
16 period; it may be that the state declined to prosecute during
17 that time period.

18 But the reality is, I believe, under the
19 Sixth Amendment, that clock is ticking.

20 **MAGISTRATE JUDGE SCHROEDER:** But how do you
21 overcome the clearly established case law by the Supreme Court
22 of the United States that says the decision to prosecute or
23 not prosecute rests exclusively in the discretion of the
24 Executive Branch?

25 **MR. CONNORS:** Here's how I overcome that -- I don't

1 disagree with the discretion afforded to a law enforcement
2 agency, state or federal, but I do disagree that they can let
3 that discretion run perilously close, and in this case the
4 last day of the statute of limitations, without being subject
5 to a challenge for due process.

6 **MAGISTRATE JUDGE SCHROEDER:** But, once again, you
7 come back to it has to be done for either a tactical advantage
8 or it has to be such that it causes prejudicial harm to the
9 defendant.

10 **MR. CONNORS:** Let's talk a little bit about that
11 because into the analysis of *U.S. vs. Marion* and some of the
12 other cases, they talk about -- let's look at the
13 justification for the delay. There needs to be some
14 explanation as to why cases sit for four years, 364 days.

15 And they weigh that certainly in a speedy trial
16 analysis, but they also weigh it in a due process claim. Was
17 it an unjustified or an unreasonable delay?

18 Some courts even say because of the length of the
19 delay, you can presume that there was some prejudice that
20 attached to that delay because it took so long. In *Marion* the
21 Court said flat out to the Government, I think it was oral
22 argument, but it's in the decision, they said you would not
23 argue with us that if this were a post-indictment delay, this
24 case would be dismissed.

25 **MAGISTRATE JUDGE SCHROEDER:** Under the Speedy Trial

1 Act.

2 **MR. CONNORS:** And the Government conceded that.
3 But, remember, that's '71 so it's even before some of the
4 Speedy Trial Act provisions.

5 The Government conceded that. That's a three year
6 delay. Ours is four plus years delay, too, which is what
7 alerted me to this issue of why the Sixth Amendment might
8 apply.

9 Let me move to the questions you've raised because,
10 you know, you've raised issues that are appropriate under the
11 circumstances for my Fifth Amendment argument.

12 There's a conflict that exists within the circuits.
13 Are we required to show that it's intentional delay for the
14 Fifth Amendment to kick in? Can we show reckless disregard?
15 Can we show just prejudice? Do we have to show actual
16 prejudice? Do we have to show substantial prejudice? All of
17 those words and that criteria I took right out of the case law
18 from a couple of different circuits.

19 But what's consistent in the cases that I read is
20 that they hold that the proper inquiry is to balance the
21 prejudice to the defendant against the Government's
22 justification for delay.

23 It isn't Jack's fault. We have no justification
24 for the delay. There is nothing offered other than one little
25 statement that says we didn't know about it.

1 **MAGISTRATE JUDGE SCHROEDER:** Well, they said
2 that -- the Government position, as I understand it, is that
3 there was this ongoing situation involving the City of Buffalo
4 Police Department and their investigation based on the
5 complaints made by the alleged victims, and the 50(h) hearings
6 and all of that, that nothing was brought to the Federal
7 Government for purposes of a civil rights violation or any
8 other type of criminal violation until much later.

9 And that after the Federal Government was advised
10 of these alleged incidents, it began its own investigation in
11 order to determine whether there should be a prosecution or
12 not, and that's their explanation for the delay.

13 Now, are we getting into a credibility issue or are
14 we getting into something that you say there's still this
15 tactical advantage reason that they were doing this?

16 **MR. CONNORS:** I have no doubt that the agents on
17 this case didn't begin their investigation until shortly
18 before the indictment. I think it was an eight month period
19 beforehand.

20 My quarrel with the Department of Justice is them
21 letting this case sit for four years, 364 days when they had
22 access to every use of force complaint made against any
23 Buffalo police officer in which they were reviewing these
24 documents on a regular basis. And likely what had happened is
25 they made a value judgment these cases aren't prosecutable or

1 we'll wait to see what happens or maybe we'll cumulate the
2 evidence because it will provide us with a distinct tactical
3 advantage.

4 **MAGISTRATE JUDGE SCHROEDER:** Let me just interrupt
5 you there. When you talk about they had the use of force
6 reports, the Government alleges, and the indictment apparently
7 is based on that allegation as to some of the counts, that the
8 defendant Krug did not file a use of force report at least in
9 the one incident indicating the use of his flashlight which
10 the Government now labels a use of a weapon to strike the
11 victim with.

12 So even a review of that use of force report,
13 whatever it was that was filed, would not necessarily show
14 anything to cause alarms to go off.

15 **MR. CONNORS:** But here's what they did have and what
16 the record establishes: They had access to the
17 Internal Affairs or the Professional Standards Division, who
18 we know conducted investigations in the two old charges
19 because that's part of the record. It's admitted that he was
20 interviewed at that time.

21 **MAGISTRATE JUDGE SCHROEDER:** But that becomes a
22 catch-22, doesn't it, for purposes of a criminal prosecution?
23 Because you're faced with a *Garrity* situation.

24 You have one little segregated segment of the
25 bureau, as I understand it, that would do a *Garrity* review so

1 as to prevent any taint, but they are not part of the
2 prosecution team.

3 So the prosecution team still is theoretically
4 without knowledge.

5 **MR. CONNORS:** Mm-hmm. In this case, what we do know
6 from the documents that we've submitted, from the contract
7 that I was involved in the early stages of the negotiation of
8 that contract --

9 **MAGISTRATE JUDGE SCHROEDER:** Well, I was going to
10 come to that question. When did you start getting involved in
11 negotiating with the Government as far as whatever you were
12 negotiating before the indictments were returned?

13 Because isn't some of this delay based on that kind
14 of negotiation?

15 **MR. CONNORS:** There was never -- well, I don't --
16 the answer to that is my tenure ended with the Brown
17 administration. I had the Masiello administration, so we had
18 the early stages of the negotiation, which is why I know so
19 much about that. So --

20 **MAGISTRATE JUDGE SCHROEDER:** But -- and I'm not
21 trying to get into attorney-client by any means, and I'm not
22 saying this in any way as a criticism, but it seems to me that
23 you being the good lawyer that you are, you were trying to
24 head things off at the pass before it got to a grand jury
25 stage by getting involved with the prosecution in trying to

1 negotiate something and holding everything in abeyance, so to
2 speak, and that was what I kind of read and get out of what I
3 do know about the case, that the Government was holding off on
4 going to the grand jury with whatever it ultimately went with
5 because there were these ongoing negotiations.

6 And it would have been improper for them if there
7 was some kind of agreement between you and the prosecutor to
8 discuss a possible disposition by running off to the grand
9 jury and pulling the rug out from underneath you, so to speak.

10 So there seems to me there's this element of --
11 there's defense delay for the benefit of the defendant in
12 trying to negotiate something that will prevent an indictment.

13 **MR. CONNORS:** Well, what we were primarily
14 preventing was civil litigation commenced by the Department of
15 Justice Civil Division.

16 **MAGISTRATE JUDGE SCHROEDER:** But you already had
17 civil litigation by the alleged victims in the -- under
18 New York law when they filed their claim under Section 50 of
19 the municipal law, General Municipal Law.

20 As I understand it, there were already depositions
21 taken and discovery after complaints had been filed.

22 **MR. CONNORS:** There was civil litigation for
23 injunctive relief commenced in about four cities nationwide
24 and that was one of the objectives when they came into Buffalo
25 to discuss that, but a settlement was worked out that gave

1 them, the Department of Justice, full access, a tracking
2 system and also access to each officer's investigation
3 history, regardless of *Garrity*, privileged material, things
4 like that. They had access to all of that and --

5 **MAGISTRATE JUDGE SCHROEDER:** But were you -- were
6 you representing the City of Buffalo?

7 **MR. CONNORS:** We were.

8 **MAGISTRATE JUDGE SCHROEDER:** Well, then what the
9 City of Buffalo as a municipality and governmental body was
10 doing does not necessarily equate with the rights of the
11 defendant.

12 And so whatever was going on as far as what will
13 benefit the City of Buffalo is a separate unrelated issue.

14 **MR. CONNORS:** I agree.

15 **MAGISTRATE JUDGE SCHROEDER:** But if you were
16 negotiating with the Government to prevent grand jury action
17 or criminal action or some other kind of government action to
18 be taken against the defendant as the defendant's attorney,
19 then he's going to be accountable and attributable for that
20 delay.

21 **MR. CONNORS:** I see your point, and the answer to
22 that is unequivocally no. The only thing we dealt with was to
23 provide access to individual reports, documentation and to set
24 up a better system for reviewing complaints and making those
25 complaints available to the Department of Justice for their

1 review.

2 **MAGISTRATE JUDGE SCHROEDER:** In your role as
3 representing the City?

4 **MR. CONNORS:** Exactly.

5 **MAGISTRATE JUDGE SCHROEDER:** But I thought you also
6 admitted that you at some stage were representing the
7 defendant in negotiations with the Government pre-indictment?

8 **MR. CONNORS:** No.

9 **MAGISTRATE JUDGE SCHROEDER:** Or pre-superseding
10 indictment?

11 **MR. CONNORS:** No, no, no, no, no.

12 **MAGISTRATE JUDGE SCHROEDER:** Oh, you never had
13 negotiations --

14 **MR. CONNORS:** No, no.

15 **MAGISTRATE JUDGE SCHROEDER:** Okay.

16 **MR. CONNORS:** I see your point. No, absolutely not.

17 **MAGISTRATE JUDGE SCHROEDER:** All right.

18 **MR. CONNORS:** So the -- the issue then becomes, for
19 purposes of the Fifth Amendment analysis, what standard do we
20 apply. What does our circuit tell us? What does the Supreme
21 Court tell us?

22 And so the Second Circuit has had some variation in
23 the standards adopted depending upon which panel renders the
24 decision. Very interesting. Some panels have said actual
25 prejudice you have to show; some have said it must be

1 substantial; other panels have failed to identify and
2 articulate the degree of prejudice and have looked instead at
3 the reasons and justification for the delay.

4 For example --

5 **MAGISTRATE JUDGE SCHROEDER:** In the context of
6 tactical advantage?

7 **MR. CONNORS:** Well, they say this -- Second Circuit
8 cases, other panels have held the defendant must show an
9 unjustifiable Government conduct, all right? The reasons for
10 the delay were improper. And then there was one panel, as you
11 suggest, that says unjustifiable governmental conduct, such as
12 deliberate delay to achieve a potential tactical advantage.

13 So what I want to argue here today is that that
14 occurred. And first I will argue that the traditional
15 prejudice is inaccessible witnesses or lost evidence.

16 Here we have a situation where Marcus Worthy
17 testified that a witness named Sharona, a woman who was
18 mentally disabled at the time, subject of a domestic violence
19 report, the woman -- the report that came out, man with a gun
20 waving it around in the vicinity of the home, which is what
21 brought Corey Krug to that area in 2010.

22 The report itself alleged that she was beat with a
23 pistol. I mean, serious allegations about emergency conduct.
24 Now, we didn't get that report in discovery. I'm not faulting
25 Jack. I'm sure it doesn't exist anymore. We've tried to find

1 it. It's gone, it doesn't exist.

2 That's a report that would obviously be helpful to
3 us. That's a report that would identify the reasons why he
4 was there, identify the emergency nature of the situation --

5 **MAGISTRATE JUDGE SCHROEDER:** Well, the City's CAD
6 would establish what went out in the transmission. And from
7 what I recall reading, there's no question that there was a
8 call for a domestic violence report that Officer Krug as well
9 as other officers responded to that call, and that when
10 Officer Krug arrived, he saw the individual that was deemed to
11 be the violator and that that individual allegedly had a gun
12 tucked in his waist, and that Officer Krug then reacted to
13 that situation by allegedly physically grabbing that person
14 and putting him up against the car and securing him.

15 And then the obviously disputed issues are how he
16 did that and what he did as far as excessive use of force is
17 concerned.

18 **MR. CONNORS:** Right.

19 **MAGISTRATE JUDGE SCHROEDER:** So in the context of
20 the indictment, I don't think there's any dispute about there
21 being a response for a domestic relations call.

22 So the absence of this victim of that domestic
23 violence doesn't really play any substantial or material role
24 in what allegedly occurred when the defendant Krug confronted
25 the person with the gun.

1 It's -- the -- the indictment relates to how that
2 person with the gun was allegedly treated by Officer Krug,
3 which is the subject matter of the indictment.

4 **MR. ROGOWSKI:** Your Honor, just to clarify slightly,
5 the factual basis in that incident, the other officers
6 arriving at the scene actually secured the individual and
7 located the gun, and Officer Krug was in slightly or as that
8 was occurring.

9 **MAGISTRATE JUDGE SCHROEDER:** Am I mixing it up with
10 one of the --

11 **MR. ROGOWSKI:** Yes, you are.

12 **MAGISTRATE JUDGE SCHROEDER:** -- I'm mixing it up
13 with one of the other cases?

14 I know there's three incidents.

15 **MR. CONNORS:** Right.

16 **MAGISTRATE JUDGE SCHROEDER:** All right. I apologize
17 for that.

18 **MR. CONNORS:** No, no. The facts essentially are
19 correct. Jack is right, there are other officers at the scene
20 as well.

21 But the reason I raise Sharona is because she's one
22 of two missing eyewitnesses. The second one is a woman that
23 Officer Melinda Jones identified at her examination before
24 trial.

25 **MAGISTRATE JUDGE SCHROEDER:** Now, were either one

1 of those ever examined in the claim against the City?

2 **MR. CONNORS:** No.

3 **MAGISTRATE JUDGE SCHROEDER:** No depositions taken?

4 **MR. CONNORS:** Not of the witnesses.

5 **MAGISTRATE JUDGE SCHROEDER:** No interviews?

6 **MR. CONNORS:** No, not that we can find. We've asked
7 for them and I'm sure both Jack and I are trying to find them
8 diligently, but as far as we both know they're missing.

9 **MAGISTRATE JUDGE SCHROEDER:** Nothing by the
10 Internal Affairs?

11 **MR. CONNORS:** We have the personnel file, but we
12 don't -- we don't have the Internal Affairs file.

13 **MAGISTRATE JUDGE SCHROEDER:** How about the CAD
14 reports?

15 **MR. CONNORS:** We think we've -- we think that
16 you've -- Jack has gotten everything from the Buffalo Police
17 Department and we're going to follow it up ourselves with a
18 subpoena, but we don't think these exist.

19 Because it's not just that, there's pictures and
20 photos of Marcus Worthy who claims that he has an injury -- he
21 has the staples in his head, but there's other evidence as
22 well.

23 So we're missing the 911 call from Sharona; we're
24 missing Sharona; we're missing the photos of Worthy, which
25 we -- I don't think anyone disputes that he had three staples

1 in his head; but there's, as you well know, the way in which
2 evidence -- the way in which injury is created can often be
3 explanatory as to what happened. So we don't have that
4 either.

5 And now we don't have Officer Melinda's eyewitness
6 that she described as the black female standing 2 feet away
7 from Mr. Worthy when everyone was at the scene. She may have
8 written down her name, we talked to her, but she has no
9 recollection, she never contacted her, doesn't have them and
10 that was --

11 **MR. ROGOWSKI:** Judge, we may have that witness. We
12 don't have Ms. Sharona.

13 **MAGISTRATE JUDGE SCHROEDER:** When was the 50(h)
14 claim filed with the City by the individual in that event?

15 **MR. CONNORS:** Within 90 days.

16 **MAGISTRATE JUDGE SCHROEDER:** And so within 90 days
17 and somebody's on notice that there are these witnesses and
18 there's this claim.

19 And you told me you were representing the City --

20 **MR. CONNORS:** No, no, no, I wasn't. I was only
21 involved in the negotiations with DOJ. They had corporation
22 counsel.

23 **MAGISTRATE JUDGE SCHROEDER:** But the corporation
24 counsel's office --

25 **MR. CONNORS:** Exactly.

1 **MAGISTRATE JUDGE SCHROEDER:** -- was representing
2 the City and as part of that 50(h) claim under New York
3 Municipal Law, that information would have been available or
4 theoretically --

5 **MR. CONNORS:** You get the testimony of the claimant.

6 **MAGISTRATE JUDGE SCHROEDER:** Right, filing the
7 claim.

8 **MR. CONNORS:** Exactly.

9 **MAGISTRATE JUDGE SCHROEDER:** But then there was
10 also -- there's background information of a domestic violence
11 call put out, Buffalo Police responding, somebody at that
12 stage is put on notice, well, we better start gathering
13 information.

14 **MR. ROGOWSKI:** And other officers testified as well,
15 Your Honor.

16 **MAGISTRATE JUDGE SCHROEDER:** Pardon me?

17 **MR. ROGOWSKI:** Other officers testified.

18 **MAGISTRATE JUDGE SCHROEDER:** I assumed that.

19 **MR. CONNORS:** We reached out to the civil attorneys
20 whose primary concern was what would be the exposure in the
21 civil case, and this information's unavailable at present.

22 So we look at that and we see that as a classic
23 example of witnesses that are no longer available and some
24 evidence that's lost.

25 **MAGISTRATE JUDGE SCHROEDER:** All right, now let me

1 ask you this -- and I apologize for interrupting your train of
2 thought.

3 **MR. CONNORS:** No, no, that's okay.

4 **MAGISTRATE JUDGE SCHROEDER:** I also do recall, and
5 I'm not sure it's Justice Thomas who wrote the opinion, the
6 Supreme Court of the United States and some of the
7 Second Circuit cases have gone so far as to say yes, we even
8 acknowledge and recognize that with the passage of time
9 memories fade, witnesses disappear and so forth, but that is
10 not enough for a due process violation.

11 **MR. CONNORS:** The way it comes up is exactly what --
12 that language that you said because if that's your only claim,
13 that some unidentified witness can't recall or that there's
14 some -- the word they use is unexplicated evidence that's
15 lost.

16 Here we've identified two witnesses and some
17 evidence as well. We feel under our standard in the
18 Second Circuit, as varying as it is panel to panel, that we
19 need to show something specific and that's why we've
20 identified those particular individuals as lost witnesses.

21 Not just saying we lost the witness. We've given
22 the name, we've given the significance of their testimony, we
23 think that makes the specific burden that's required of us to
24 claim a loss of due process of law.

25 **MAGISTRATE JUDGE SCHROEDER:** Apparently, that

1 position has now been reduced by 50% based on Mr. Rogowski's
2 statement that the Government thinks they have that one
3 witness.

4 **MR. ROGOWSKI:** Actually, we have two civilian
5 witnesses. One I believe might be the one he's referencing,
6 Judge, but we don't have the one --

7 **MAGISTRATE JUDGE SCHROEDER:** No, that's the 50% I'm
8 talking about. One out of two.

9 **MR. ROGOWSKI:** Right.

10 **MR. CONNORS:** But the other panels that talk about
11 the unfair tactical advantage as well. They also mention the
12 standard of whether or not there's reckless disregard, and all
13 of these panels say what's the justification for delay?

14 **MAGISTRATE JUDGE SCHROEDER:** Isn't that in the
15 context of prosecutorial misconduct?

16 **MR. CONNORS:** No, no, it's in the due process.

17 **MAGISTRATE JUDGE SCHROEDER:** Reckless disregard,
18 though?

19 **MR. CONNORS:** Yes, reckless disregard -- I'm sorry,
20 I should have finished that sentence -- of the potential
21 prejudicial impact to Officer Krug. So it's not just reckless
22 disregard for the rights, it's of the prejudicial impact.

23 And so the courts that we had given you, Supreme
24 Court cases and a couple of Second Circuit cases that say
25 improper reasons for the delay or unjustifiable Government

1 conduct was sufficient in and of itself to show a tactical
2 advantage.

3 So basically if the Government has no reason as to
4 why cases sat for more than four years, that in and of itself
5 is a tactical advantage.

6 **MAGISTRATE JUDGE SCHROEDER:** Did they say that or
7 did they say that would create a presumption of sufficient
8 prejudice?

9 **MR. CONNORS:** Courts have held that improper reasons
10 for the delay or unjustifiable Government conduct was
11 sufficient to show tactical advantage, and that's in the
12 Guerra case. But actually we have a little bit more in this
13 case.

14 I talked to you about the close relationship
15 between DOJ and the Buffalo Police Department, but I want to
16 talk to you a little bit about tactical advantage.

17 **MAGISTRATE JUDGE SCHROEDER:** Well, that's the Civil
18 Rights Division of DOJ, which is overseeing and monitoring
19 certain municipalities in the United States and their police
20 force operations because of alleged practices that were being
21 allowed to be perpetrated.

22 **MR. CONNORS:** So a couple of months ago I stumbled
23 on this case, admittedly it's in the Appellate Division, Third
24 Department, State of New York and it was -- it caught my
25 attention because I knew the lawyer who was handling the case,

1 and the Court held that there was a delay that was per se
2 violation of due process of law without a showing of
3 prejudice. And the case is People vs. --

4 **MAGISTRATE JUDGE SCHROEDER:** Do you think the
5 Second Circuit will accept that?

6 **MR. CONNORS:** Every once in a while they quote the
7 Appellate Division.

8 **MAGISTRATE JUDGE SCHROEDER:** Did Judge Bichel write
9 the decision?

10 **MR. CONNORS:** No, no. It was written by the chief
11 judge. No, it wasn't -- Lahtinen is the judge, but it was --
12 here's what that -- that caught my eye, first of all, but then
13 I read through the case and I saw this, which I think is
14 particularly relevant to our situation, they were trying to
15 justify the delay and they said, well, it kind of bounced back
16 and forth, the U.S. Attorney had it for a while, the district
17 attorney involved in the county had it for a while, and the
18 Court said same thing applies here, since both offices are
19 coordinate arms of the State in the criminal law enforcement
20 field, and any delay occasioned by one is chargeable to both,
21 citing a couple of Court of Appeals cases and one
22 Appellate Division case where leave was denied.

23 So, I mean, I think you have a situation here where
24 you can't really say, well, we didn't have it, the D.A. had it
25 or we gave it to the U.S. Attorney, but they bounced it back

1 and forth, that's what caused the delay.

2 I mean, I think when a case sits, when there's
3 knowledge of a coordinate arm of law enforcement of the
4 State --

5 **MAGISTRATE JUDGE SCHROEDER:** But wasn't that in
6 reference to the Albany County District Attorney's Office and
7 the --

8 **MR. CONNORS:** U.S. Attorney.

9 **MAGISTRATE JUDGE SCHROEDER:** -- the
10 Appellate Division, Third Department was trying to claim that
11 the Federal Government was a coordinate that was bound by New
12 York State law to do something?

13 **MR. CONNORS:** I don't think they went that far, but
14 this is what they said: The fact that this matter was
15 initially referred to the U.S. Attorney's Office and the
16 TCPD -- that must be the county police department -- did not
17 bring this file to the Albany County D.A. until November of
18 2013 provides no justifiable excuse for the delay. Then they
19 go into the since both offices are the coordinate arms of law
20 enforcement for the State.

21 And I think it applies here. You can't really --
22 well, you can say it's in the arms of the district attorney
23 right now, we're not gonna deal with it or the U.S. Attorney
24 has it for a while. You can say that all you want.

25 But when you come up four years and 364 days later

1 and try to prosecute it, you're going to be hit with a due
2 process claim. It's a reasonable fair claim and a reasonable
3 fair reading of the due process statute.

4 **MAGISTRATE JUDGE SCHROEDER:** I don't disagree at
5 all, but then we go to the case law that says this is what you
6 need to establish a violation of due process.

7 And the main theme that runs through all of the
8 cases, even with the disagreeing panels from the
9 Second Circuit, is either tactical advantage on behalf of the
10 prosecutor or prejudicial harm.

11 **MR. CONNORS:** Right. So I think that the witnesses
12 we've identified takes us a long way in the prejudicial harm.

13 Tactical advantage, Judge, look, you were in
14 private practice, you were a U.S. Attorney, you know as well
15 as I do that holding on to cases to cumulate a case so that
16 you have one -- more than one case to prosecute is a
17 tremendous tactical advantage. Two cases are better than one.
18 Three cases are even better.

19 So if you hold on to those cases in the archives of
20 the City of Buffalo until the time comes when you get a case
21 with a video and everything else and you decide to prosecute
22 that, and you throw them in there with that case, you cannot
23 say with a straight face that they're not in there for
24 tactical advantages.

25 They buttress the other case. And, in fact, a lot

1 of the case law says one of the fears you have to worry about
2 is whether or not you take a strong -- a weak case and
3 buttress it with additional cases. One of the other
4 reasons -- it's in a severance argument, but it's relevant
5 here, they say the danger of trying joint cases is because the
6 jury will think there's a predisposition here. They will
7 think --

8 **MAGISTRATE JUDGE SCHROEDER:** And that's why we have
9 a severance motion.

10 **MR. CONNORS:** They will think there's a propensity.

11 **MAGISTRATE JUDGE SCHROEDER:** But let me back up a
12 minute because I'm a little bit confused in that in this
13 particular situation the Government came forward with the
14 earlier events and didn't come forward with the -- what I'll
15 call the Channel 7 videotaping event -- until after the other
16 two.

17 And you may recall I gave Mr. Rogowski somewhat of
18 a tongue lashing as the -- as the messenger, not him
19 personally -- as to what took the Government so long when it
20 had what appeared to be a ready made case if you got a
21 Channel 7 videographer videotaping the actual alleged assault
22 to file a complaint or to present to the grand jury.

23 So it wasn't like this is the first case that was
24 charged and then oh, let's go find some more because now we
25 got a strong case to -- we can load up on.

1 **MR. CONNORS:** That's exactly --

2 **MAGISTRATE JUDGE SCHROEDER:** It was just the
3 opposite.

4 **MR. CONNORS:** No, no.

5 **MAGISTRATE JUDGE SCHROEDER:** They came forward with
6 the other two first.

7 **MR. CONNORS:** No, they say that in their papers.
8 They say that when the case was brought to them after the
9 videotaping incident, they then went back and looked in the
10 archives of the City of Buffalo that were kept pursuant to
11 that agreement I keep talking about and found that there were
12 two other cases -- in fact, they found some others, but they
13 were chagrined by the fact that they weren't within the
14 statute of limitations.

15 And that's when they brought it, precisely for a
16 tactical advantage.

17 **MAGISTRATE JUDGE SCHROEDER:** But the criminal
18 complaint that I signed --

19 **MR. CONNORS:** Yes.

20 **MAGISTRATE JUDGE SCHROEDER:** -- was not the
21 videotape case?

22 **MR. CONNORS:** It was.

23 **MR. ROGOWSKI:** It was.

24 **MAGISTRATE JUDGE SCHROEDER:** It was?

25 **MR. CONNORS:** It was, yeah.

1 **MAGISTRATE JUDGE SCHROEDER:** I stand corrected.

2 **MR. CONNORS:** So you see what happened, look it,
3 you're right on the money on the -- I'm not saying you agree
4 with me, but you're right on the issue.

5 The issue becomes nobody could possibly say with a
6 straight face that they didn't cumulate the evidence to gain a
7 tactical advantage.

8 I mean, if he can get away with it, you know, I
9 understand why it's stronger. I would do the same thing. But
10 it is violative of due process of law to do that when you wait
11 so long for the unfair tactical advantage.

12 And we have that here. This is a rare case, a
13 strong case. It's bolstering the evidence. And I know you're
14 not -- it's -- it's called the legal equivalent of piling on
15 and that really -- all the research I did on the joinder, I
16 gave you in the brief as well, but they talk about when you
17 try to join cases that are of a similar nature and that's the
18 only reason that Jack's offered, the other two or three
19 reasons he's not offered, the -- the benefit of joinder
20 largely disappears. That's right from the case law.

21 The reason it largely disappears is because you
22 don't get that much economy, but you run the substantial risk
23 that a jury's not going to like the defendant, not have a
24 emotional response -- this is right out of the case law --
25 they will have a -- a feeling that he's a bad person as

1 opposed to whether or not the proof is guilty beyond a
2 reasonable doubt.

3 **MAGISTRATE JUDGE SCHROEDER:** It's the classic where
4 there's smoke there's fire --

5 **MR. CONNORS:** Classic.

6 **MAGISTRATE JUDGE SCHROEDER:** -- because there's so
7 much. But the case law also says that can be corrected either
8 with a charge to the jury by the trial judge, or you have a
9 remedy: Severance.

10 **MR. CONNORS:** And you know I'm gonna be begging for
11 a severance, but the case law says under Rule 8(a) they're
12 seeking to joinder, seeking joinder for the one reason, same
13 or similar character that in many instances curative
14 instructions have no effect whatsoever, and all courts
15 instructively should be careful to do that, sever those counts
16 because you can't cure it.

17 You can't possibly give an instruction that's going
18 to cure that.

19 **MAGISTRATE JUDGE SCHROEDER:** But you have a tough
20 row to hoe in establishing that's why it was done, don't you?

21 In other words, you would agree that the law says
22 you can join different events in the same indictment?

23 **MR. CONNORS:** You can.

24 **MAGISTRATE JUDGE SCHROEDER:** So long as they're
25 relatively related.

1 **MR. CONNORS:** Meet the criteria.

2 **MAGISTRATE JUDGE SCHROEDER:** But you're now saying
3 that motive for doing that was to gain a tactical advantage.

4 **MR. CONNORS:** But, Judge, it's logical and it is
5 realistic. Real world evidence is such that if you -- and
6 they've -- they've admitted, and honestly and candidly they've
7 said we had the videotape incident, we went back and looked to
8 see if there were any others.

9 Why did they go back and look to see if there were
10 any others other than to get a tactical advantage? All right,
11 I'm not saying that they necessarily are not allowed to try
12 for a tactical advantage, but it's --

13 **MAGISTRATE JUDGE SCHROEDER:** Well, wouldn't another
14 side of the coin be anticipating a defense of, well, this
15 isn't in the nature or character of the defendant to do
16 something like this, this is just a -- a unique situation,
17 et cetera, et cetera, whereas if they want to show a pattern
18 and practice --

19 **MR. CONNORS:** Fine.

20 **MAGISTRATE JUDGE SCHROEDER:** -- to overcome that
21 defense, isn't that a legitimate reason?

22 **MR. CONNORS:** We'll fight that out under 404(b), is
23 it motive? Is it identity? Is it accident? Is it mistake?
24 Does it fit any of that criteria?

25 It clearly doesn't. They wouldn't get it in under

1 404(b). They might try to do that, you're absolutely right,
2 from a strategic tactical advantage they might try to bring it
3 in, but the case law on severance and joinder says, listen, we
4 wouldn't admit this under 404(b), we're not gonna join these
5 cases for trial.

6 So in this situation I just think that no one's
7 going to come out and file an affidavit and say we did this
8 for a tactical advantage. But seriously --

9 **MAGISTRATE JUDGE SCHROEDER:** But the other side of
10 that coin is the broad face -- bald face statement of well,
11 they did it for tactical advantage is not enough either.

12 **MR. CONNORS:** What other reason could there be other
13 than to cumulate the evidence, make the cases stronger,
14 bolster one with the other?

15 **MAGISTRATE JUDGE SCHROEDER:** Well, the Government
16 in its response says we didn't really get this information in
17 this case until well down the road.

18 A lot of time apparently was spent by the
19 Internal Affairs people. Then you had the 50(h) civil
20 lawsuits brought by the alleged victims of the actions of the
21 defendant in this case.

22 And by the time we, the Government, the Federal
23 Government was alerted to this we started looking into it, the
24 FBI started investigating it, and then we started to put
25 together a case, we had the videographer thing, but in doing a

1 detailed investigation that the FBI did, it decided to go back
2 and look at records to see if there was anything else and
3 that's when they found these other events. The statute of
4 limitations was close to running, so they had to get into a
5 grand jury and that's why we did what we did. That's their
6 explanation.

7 Now, it's kind of -- let me use the analogy of
8 employment discrimination that I know you also have
9 familiarity with. They have articulated a legitimate reason,
10 in their opinion, for doing what they did or for what was
11 done.

12 The burden -- the burden -- there's no burden in a
13 criminal defendant, but there's a shifting then of saying
14 you've got to come with something more now to show either that
15 is an outright misrepresentation or that it has no valid
16 substance to it.

17 **MR. CONNORS:** It's predicate, it's --

18 **MAGISTRATE JUDGE SCHROEDER:** Yeah.

19 **MR. CONNORS:** The word I'm thinking of, it's --
20 well, here's something more. When the November 27th incident
21 occurred, within a very short period of time a referral was
22 made from the Buffalo Police Department to the U.S. Attorney's
23 Office, okay?

24 So there was nothing preventing them from doing
25 that same exact thing in 2010 and 2011. But they didn't do

1 it. They let it sit in their archives. The Federal
2 Government was content to do it at that point, and then lo'
3 and behold, they went back to dig into the archives clearly to
4 support and buttress the case.

5 That's what was done. I mean, I don't think
6 there's a trial lawyer that would recognize that there's
7 another reason other than a tactical reason.

8 Even the reason they proffer is a tactical reason,
9 joining it for trial is a tactical reason, right? I mean, I
10 suppose my argument --

11 **MAGISTRATE JUDGE SCHROEDER:** Well, I guess the
12 operative word is unfair.

13 **MR. CONNORS:** Right, unfair tactical advantage.

14 **MAGISTRATE JUDGE SCHROEDER:** Right. But you can
15 have a tactical reason. I mean, that's what trial lawyers do:
16 They set up tactically how they want to approach a case.

17 **MR. CONNORS:** I suppose my argument would be weaker
18 if they filed individual indictments and then I'd just be
19 arguing pre-indictment delay.

20 But you cannot overlook the fact that they joined
21 them all for trial. That is a --

22 **MAGISTRATE JUDGE SCHROEDER:** I understand that.
23 And the response to that, I guess, is well, make your motion
24 to sever.

25 **MR. CONNORS:** Which I did.

1 **MAGISTRATE JUDGE SCHROEDER:** Right, right.

2 **MR. CONNORS:** But I'd just as soon not have to
3 sever.

4 **MAGISTRATE JUDGE SCHROEDER:** I understand. But
5 what we're coming back to and -- and I'm not shutting you off
6 by any means, is it's -- it's always going to come back to
7 this basic case law admonition from the Second Circuit and the
8 Supreme Court of the United States of you got a due process
9 claim, then you have to show prejudice or harm, or it was done
10 deliberately by the prosecution to gain an unfair tactical
11 advantage.

12 **MR. CONNORS:** Yeah, the cases surprisingly, because
13 I went into this research with exactly that analysis, the
14 cases are a little different in the sense that certain panels
15 will describe what you have to show a little bit differently
16 and it's not all that high a burden for me to show.

17 But every one says you look at the reasons for the
18 delay.

19 **MAGISTRATE JUDGE SCHROEDER:** And they've
20 articulated theirs.

21 **MR. CONNORS:** No reasons articulated.

22 **MAGISTRATE JUDGE SCHROEDER:** Well, they talked
23 about this delay in getting --

24 **MR. CONNORS:** We didn't get it, okay? And you look
25 at the justification for the delay, the length of the delay ,

1 that's important here because when you have a delay that goes
2 that far, there's a number of cases that say you can presume
3 prejudice because of the delay.

4 Who can defend something that happened four plus
5 years ago?

6 **MAGISTRATE JUDGE SCHROEDER:** But then I have to
7 look at the other cases that say the main protective rule of
8 law on the delay argument is the statute of limitations --

9 **MR. CONNORS:** Subject --

10 **MAGISTRATE JUDGE SCHROEDER:** -- and that's why we
11 have a statute of limitations. If the Government is going to
12 prosecute a case criminally, it has to do so in a timely way
13 in accordance with the appropriate statute of limitations.

14 **MR. CONNORS:** Subject to the due process clause.

15 **MAGISTRATE JUDGE SCHROEDER:** Subject to the due
16 process clause, which brings us back to the two, unfair
17 tactical advantage or prejudicial harm suffered by the
18 defendant.

19 **MR. CONNORS:** So here's one of the considerations in
20 the myriad of cases I've read in the last two days, they say
21 this: In certain instances you have direct presentments to
22 grand juries. So you have a situation where there is no
23 proverbial sword hanging over the defendant's head, there's no
24 public humiliation, there's no public posture.

25 In fact, the *Marion* case was an SEC investigation

1 as well. You have nothing really that's pending. So under
2 those circumstances, what's occurring in terms of prejudice,
3 violation of constitutional rights is not looked upon to be as
4 serious as a situation like the one we have here where you
5 have a police officer whose job is in jeopardy, who has been
6 accused in Professional Standards, who has been sued as well
7 and who at any moment in that four plus years can be the
8 recipient of a federal grand jury indictment.

9 It's just they elected not to do that. Now, I say
10 they can't do that. They can't wait until the eleventh hour
11 and say you know what? We never prosecuted before, we weren't
12 going to do it, but now because we have a case with a video
13 and we can buttress that case, we're going to throw the book
14 at him.

15 We'll try that video case. Let us try that case
16 alone. But don't lump us up with these other cases as well
17 that are four and a half, five years old. That's just not
18 fair.

19 That's what due process is, fundamental notions of
20 fairness.

21 **MAGISTRATE JUDGE SCHROEDER:** That's your severance
22 argument to Judge Arcara.

23 **MR. CONNORS:** I make it to you, too.

24 **MAGISTRATE JUDGE SCHROEDER:** You can make it, but I
25 can't do anything about it jurisdictionally.

1 **MR. CONNORS:** But this -- this is -- this is
2 interesting. It's a different kind of an argument that really
3 has some meat to it.

4 **MAGISTRATE JUDGE SCHROEDER:** I'm not denigrating
5 your argument at all. I'm just saying I don't have
6 jurisdiction for purposes of the severance part.

7 **MR. CONNORS:** But you can recommend on the due
8 process.

9 **MAGISTRATE JUDGE SCHROEDER:** Well, I will do a
10 Report and Recommendation on the due process claim, yes.

11 **MR. CONNORS:** So there's just two last points that I
12 wanted to make. We did raise an issue with respect to the
13 sufficiency of the allegation in Count 2.

14 It's a pretty technical argument that we made and I
15 think it's a fair argument to make, but I understand the
16 response. I just don't agree with the case that Jack gave us.

17 The claim is that the report itself was a false
18 document because you didn't check --

19 **MAGISTRATE JUDGE SCHROEDER:** This is the knowledge
20 of --

21 **MR. CONNORS:** Impact weapon --

22 **MAGISTRATE JUDGE SCHROEDER:** -- of what was used as
23 a weapon?

24 **MR. CONNORS:** Impact weapon. So -- so I looked at
25 that and I said to myself, first of all, where is the federal

1 nexus? Where is the jurisdiction?

2 And he cited a good case, but a case that's easily
3 distinguished because there clearly was a federal nexus in the
4 *Gray* case that he cited. But it looked to me as though this
5 is a situation where if that's a false report, that's clear
6 Penal Law stuff. That's clear violations of filing a false --
7 offering a false instrument for filing.

8 I don't see any federal nexus. So I looked at it a
9 little bit closer and I made some calls. The box is impact
10 weapon. Now, impact weapon by definition is what's issued to
11 the police officer.

12 **MAGISTRATE JUDGE SCHROEDER:** And as I understand
13 it, and I've seen them, as I'm sure you have, the flashlights
14 that the police officers have is not just a little short
15 plastic type thing people buy for a couple of dollars; it's a
16 pretty big substantial --

17 **MR. CONNORS:** 12 inch mag light. He buys it
18 himself, by the way.

19 **MAGISTRATE JUDGE SCHROEDER:** -- apparatus.

20 **MR. CONNORS:** He buys it himself.

21 **MAGISTRATE JUDGE SCHROEDER:** I'm just saying
22 physically it's a substantial piece of material.

23 **MR. CONNORS:** Sure. But what if -- what if a police
24 officer in the use of excessive force took off his shoe and
25 started hitting someone with that?

1 Would he have to file -- it might be a violation of
2 242, but would he have to check off impact weapon on that
3 particular report? I don't think he would.

4 And, furthermore, I think to satisfy that
5 sufficiently you would have to have someone in the grand jury
6 saying this is by definition an impact weapon -- not what
7 Merriam-Webster says, but it's an impact weapon.

8 And, by the way, the Buffalo police officers know
9 that this is an impact weapon and they should check off that
10 box.

11 **MAGISTRATE JUDGE SCHROEDER:** So the grand jury,
12 though, all it has to say is we find there's probable cause
13 that this is a weapon.

14 This is really an issue for a jury to decide, isn't
15 it, whether the flashlight falls in the category of a weapon?

16 **MR. CONNORS:** Well, I -- I -- I was concerned that
17 you would say that.

18 **MAGISTRATE JUDGE SCHROEDER:** I guess there's no
19 question that the report that was filed does not indicate the
20 use of the flashlight.

21 **MR. CONNORS:** The box under impact weapon is left
22 blank.

23 **MAGISTRATE JUDGE SCHROEDER:** Right.

24 **MR. CONNORS:** There's a description of what
25 happened.

1 **MAGISTRATE JUDGE SCHROEDER:** Right. But there's no
2 reference made to hitting the -- a person with the flashlight.

3 **MR. CONNORS:** Jack's going to give us page 2.

4 **MR. ROGOWSKI:** It doesn't have any reference.

5 **MAGISTRATE JUDGE SCHROEDER:** Doesn't have any
6 reference. It just --

7 **MR. ROGOWSKI:** I will supply that. I apologize.

8 **MAGISTRATE JUDGE SCHROEDER:** -- talks about there
9 was an arrest made and so forth and so on.

10 **MR. CONNORS:** Injury --

11 **MAGISTRATE JUDGE SCHROEDER:** Because the report is
12 called a use of excessive force report.

13 **MR. CONNORS:** Use of force.

14 **MAGISTRATE JUDGE SCHROEDER:** And that what was
15 filed indicated there was no excessive force used.

16 **MR. ROGOWSKI:** It's labeled use of force and it goes
17 from the various levels from --

18 **MAGISTRATE JUDGE SCHROEDER:** Right.

19 **MR. ROGOWSKI:** -- grabbing somebody, putting
20 somebody against the car and then using an impact weapon or a
21 weapon, a firearm.

22 **MAGISTRATE JUDGE SCHROEDER:** Right. And so what
23 the Government has alleged by way of the grand jury
24 indictment, as I understand it, is by failing to check that
25 box the report was not an accurate report; the indictment says

1 it was basically a false report because the facts and
2 circumstances that the grand jury heard were that the
3 defendant used his flashlight to hit the person in the head
4 and the -- the evidence developed during the 50(h)
5 proceedings, as I understand it, there was a gash and that
6 person was taken and stitches were applied.

7 So that's -- that count now whether a flashlight is
8 to be deemed a weapon, that box should have been checked, I
9 think is a jury question.

10 **MR. ROGOWSKI:** Your Honor, in fact, he checked no
11 where it said use of a weapon. It wasn't left blank, it was
12 checked no.

13 **MR. CONNORS:** I thought it was left blank?

14 **MR. ROGOWSKI:** I don't have it in front of me,
15 Judge, but I recall that.

16 **MAGISTRATE JUDGE SCHROEDER:** Well, in any event,
17 whether the flashlight is a weapon or not is a jury question.

18 **MR. CONNORS:** He didn't -- he didn't -- right, he
19 didn't indicate it was a weapon.

20 That answer is a very good answer, but the reason
21 why I think that we need to probe further is that under
22 12(b)(3) there has to be some jurisdictional nexus to make it
23 a federal case.

24 And the one that's offered so far under the *Gray*
25 case doesn't cut it, doesn't make it. You're talking about a

1 document that's potentially a false instrument if filed with
2 the New York State agency, and I don't think there's a
3 jurisdictional basis here.

4 **MAGISTRATE JUDGE SCHROEDER:** A governmental agency
5 regarding the civil rights of a citizen.

6 **MR. CONNORS:** Well, it's a New York State, Buffalo
7 Police Department --

8 **MAGISTRATE JUDGE SCHROEDER:** Right, but it goes to
9 addressing what could be a potential claim of a civil rights
10 violation under Title 42 of the United States Code,
11 Section 1983, i.e., excessive force was allegedly used, my
12 constitutional right was violated either under the
13 Fourteenth Amendment or some other amendment because of that,
14 and by not disclosing this, this defendant allegedly was
15 trying to hide or obstruct justice in that being made known.

16 I guess that's the argument.

17 **MR. CONNORS:** I guess it is. So if you go there,
18 Judge, to make that decision, you now have put the Federal
19 Government nose to nose with the State at a time when they had
20 an opportunity to prosecute.

21 If that's the jurisdictional basis for the impact
22 weapon, that means that at that time they had jurisdiction
23 under 42, U.S.C. as you suggested and probably under 18,
24 U.S.C. to do what they should have done, which was file a
25 charge so he could defend it and not wait four and a half

1 years.

2 **MAGISTRATE JUDGE SCHROEDER:** And then I go back to
3 the case law that says when to prosecute and if to prosecute
4 is left to the discretion of the prosecution, other than the
5 requirement that they do it in a timely way by way of
6 complying with the statute of limitations.

7 **MR. CONNORS:** Unless they gain a tactical advantage
8 by doing it.

9 **MAGISTRATE JUDGE SCHROEDER:** Then we go back to due
10 process and tactical advantage, I agree.

11 **MR. CONNORS:** So the last argument -- you've been
12 gracious with your time -- the last argument is everything
13 else, I think, worked out pretty well. You know that we made
14 a lot of the arguments that are traditionally made with
15 respect to discovery.

16 **MAGISTRATE JUDGE SCHROEDER:** Right, I was going to
17 address that.

18 **MR. CONNORS:** Yeah, Jack's been pretty good about
19 all of that stuff.

20 **MAGISTRATE JUDGE SCHROEDER:** Well, let me at least
21 get that resolved so that isn't going to clutter. Obviously
22 I've got to write on the substantial issues you've raised,
23 but --

24 **MR. CONNORS:** Bill of Particulars, fine.

25 **MAGISTRATE JUDGE SCHROEDER:** Right. I'm denying

1 the application for a Bill of Particulars.

2 With the discovery material and what's been set
3 forth in the indictment, and all of the 50(h) municipal law
4 transcripts and so forth, the defendant is certainly put on
5 notice as to what the nature of the charges are and what the
6 evidence basically will consist of.

7 As far as requiring the Government to comply with
8 production of material pursuant to Rule 12 and Rule 16,
9 obviously the Government's obligated to do that and you've
10 indicated that the discovery that has been turned over appears
11 to be that way.

12 And in that same context your request for notice of
13 an expert witness and expert reports would also be required to
14 be turned over by the Government if there are going to be
15 experts --

16 **MR. ROGOWSKI:** Understood, Your Honor.

17 **MAGISTRATE JUDGE SCHROEDER:** -- so that's granted.

18 With respect to your request for a Bill of
19 Particulars, as I said, that's denied for the reasons I've
20 stated.

21 Your request for *Brady* material, that is denied in
22 that as you well know the case law, and I start with the
23 initial case of *United States vs. Coppa*, the Second Circuit
24 Court of Appeals has ruled that *Brady* material is not required
25 to be turned over immediately or upon demand, but rather it

1 must be turned over within a reasonable time before trial to
2 allow the defendant to prepare.

3 I am directing that the Government comply with the
4 requirements set forth in *Coppa* as far as *Brady* material is
5 concerned; or in compliance with the policy established by the
6 U.S. Attorney's Office as far as turning over that material
7 and/or complying with the trial judge's order of turning over
8 materials, whichever will give the defendant the most time.

9 **MR. ROGOWSKI:** Understood, Your Honor.

10 **MAGISTRATE JUDGE SCHROEDER:** The request for *Jencks*
11 material, as you well know, Mr. Connors, the statute says
12 *Jencks* material does not have to be turned over until the
13 witness has actually testified on direct and I think you're
14 familiar with the Second Circuit case law on that.

15 But, once again, I direct the Government to turn
16 over *Jencks* material to the defendant in keeping with an
17 established policy of the U.S. Attorney's Office; or in the
18 alternative, the trial judge's scheduling order with respect
19 to those matters, whichever will give more time to the
20 defendant.

21 **MR. ROGOWSKI:** Understood.

22 **MAGISTRATE JUDGE SCHROEDER:** As to the request for
23 the preservation of agents' notes in the custody or control of
24 the Government, I'm granting that to the extent that those
25 agents' notes could fall in the category of being *Jencks*

1 material.

2 As to pretrial disclosure, as to evidence that
3 would be offered pursuant to Federal Rule of Evidence 807, I'm
4 granting that only because the statute requires it. The
5 Government must give prior notice of its intent to use that
6 type of evidence at trial.

7 As to the request for disclosure of evidence
8 offered pursuant to Rule 806 of the Federal Rules of Evidence,
9 that material really falls into the realm of *Jencks* material
10 and, therefore, I'm denying that request, except for what I've
11 indicated must be done with *Jencks* material.

12 As to the request for a hearing regarding evidence
13 under Rule 404(b) and 609 of the Federal Rules of Evidence, I
14 see no requirement for a hearing. The Government is obligated
15 if it is going to use 404(b) evidence to give prior notice to
16 the defendant and, therefore, the Government is directed to do
17 that.

18 No such prior notice requirement, though, is set
19 forth in Rule 609, but it does indicate that if there's going
20 to be an issue that's going to arise, then the parties who
21 hope to use the 609 evidence are to alert the other party of
22 such evidence beforehand.

23 So I'm directing the Government to comply with that
24 requirement of the rule itself.

25 And then reserving the defendant's right to move

1 for further relief as necessary, I'm granting that in the
2 limited context of new issues or something that is developed
3 after-the-fact, so to speak, or because of something that is
4 found and turned over that was not known beforehand.

5 **MR. CONNORS:** So the last thing would be the
6 *Garrity*, it's a very short -- this is an issue that we've
7 dealt with a number of times before. Jack's representation
8 basically is there's -- he had no *Garrity* and there's a taint
9 team that's involved.

10 Here's the only request I have because, I mean, the
11 last time we litigated this I don't think we made ourselves as
12 clear as we should have, I think that was Mr. Cambria's --

13 **MAGISTRATE JUDGE SCHROEDER:** You're euphemistically
14 saying I was wrong?

15 **MR. CONNORS:** I think that was Mr. Cambria's
16 argument that wasn't as clear as it should have been.

17 I'm interested in this: The AUSA has told us that a
18 subpoena went out for the personnel file at BPD. And I'm
19 interested in if anything that went out was obtained that was
20 relative to the Internal Affairs or the PSD file, I think what
21 you should do is the same thing you did last time, you asked
22 AUSA Campana give us an affidavit tracking what you did and
23 where it went.

24 So if the subpoena went out to IA and PSD and it
25 came here and it went right to the taint team, so be it. But

1 if the subpoena went out, got that material and it went and
2 sat in a FBI agent's office or in a U.S. Attorney's Office,
3 that's fair game because it's not just direct knowledge, it's
4 indirect knowledge.

5 And keep in mind the FBI at the time was preparing
6 that extensive complaint to file as probable cause for the
7 beginning of the commencement of the prosecution in the Devin
8 Ford case.

9 So I would just like to do that. If we have that
10 and it's satisfied, there's probably no issue after that.

11 **MAGISTRATE JUDGE SCHROEDER:** Okay, I understand
12 your position. What I do recall reading from the Government's
13 response was they said that there was an FBI taint agent --

14 **MR. ROGOWSKI:** That's correct.

15 **MAGISTRATE JUDGE SCHROEDER:** -- who was assigned to
16 do the screening and review separate from the prosecutorial
17 side of the Executive Branch for purposes of making sure that
18 *Garrity* information was not in any way shared with the
19 prosecutorial side.

20 **MR. CONNORS:** Here's what the BPD tells me, Buffalo
21 Police Department: They say that we get a subpoena from the
22 Federal Government and we send them over everything and that's
23 the last we see of it.

24 So if that happened and the BPD sent over *Garrity*
25 material, that's a potential problem. If it went -- and who

1 would know at that point whether to send this to the taint
2 team or whether to send it directly to the FBI?

3 I just need to know where did it go when you got
4 the subpoena.

5 **MAGISTRATE JUDGE SCHROEDER:** I agree.

6 **MR. ROGOWSKI:** I can provide that.

7 **MAGISTRATE JUDGE SCHROEDER:** All right, so
8 Mr. Rogowski will provide that.

9 So that aspect of your motion is granted.

10 Anything else?

11 **MR. CONNORS:** Appreciate it. No, thank you, Judge.

12 **MR. ROGOWSKI:** Judge, I think he's exhausted all
13 issues here.

14 **MAGISTRATE JUDGE SCHROEDER:** I would say so. So
15 I'm reserving then on the motions to dismiss for the reasons
16 stated involving the issues of due process violation by reason
17 of delay, unfair tactical advantage issue, and I guess that's
18 basically it.

19 **MR. CONNORS:** Actual prejudice, substantial
20 prejudice --

21 **MAGISTRATE JUDGE SCHROEDER:** Actual prejudice,
22 which goes back to the due process --

23 **MR. CONNORS:** I did try to sneak in the
24 Sixth Amendment claim as well if you want to write on that,
25 Your Honor.

1 **MAGISTRATE JUDGE SCHROEDER:** All right.
2 **MR. CONNORS:** Hate to give you more work, but --
3 **MR. ROGOWSKI:** Thank you very much.
4 **MAGISTRATE JUDGE SCHROEDER:** Thank you, gentlemen.
5 **MR. CONNORS:** Appreciate it.
6 (WHEREUPON, the proceedings adjourned at 12:03 p.m.)

7 * * *

8 **CERTIFICATE OF TRANSCRIBER**

9
10 In accordance with 28, U.S.C., 753(b), I certify that
11 this is a true and correct record of proceedings from the
12 official electronic sound recording of the proceedings in the
13 United States District Court for the Western District of New
14 York before the Honorable H. Kenneth Schroeder, Jr. on January
15 21st, 2016.

16
17 S/ Christi A. Macri

18 Christi A. Macri, FAPR-CRR
19 Official Court Reporter
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